Filed 1/16/09 P. v. Camacho CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RODOLFO CAMACHO, Defendant and Appellant.	B200947 (Los Angeles County Super. Ct. No. BA314379)

APPEAL from a judgment of the Superior Court of Los Angeles County, H. Randolph Moore, Judge. Affirmed.

Maxine Weksler, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jaime L. Fuster and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

Rodolfo Camacho appeals from the judgment entered following his convictions by jury on count 1 – possession of cocaine base for sale (Health & Saf. Code, § 11351.5) and count 2 – possession of methamphetamine (Health & Saf. Code, § 11377) with an admission that he had suffered a prior felony narcotics conviction (Health & Saf. Code, § 11370.2, subd. (a)) and a prior felony conviction for which he served a separate prison term (Pen. Code, § 667.5, subd. (b).) The court sentenced Camacho to prison for eight years eight months. We affirm the judgment.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that on December 19, 2006, Los Angeles Police Detective Erik Armstrong and his partner, Los Angeles Police Officer Annette Razo, were in an unmarked car at 22nd and Central. Armstrong and Razo, using binoculars, were conducting narcotics surveillance.

After a few minutes at the location, Armstrong saw appellant and codefendant Frank Jones[1] conversing. A female approached appellant and Jones, and the three conversed. The female gave appellant money which he put in his right pants pocket. Jones then unzipped his pants, removed a small item from the crotch of his pants, and gave the item to the female, who then left. Armstrong believed he had witnessed a narcotics transaction. He lost sight of the female.

Armstrong and Razo approached appellant and Jones and identified themselves as police officers. After Jones was arrested on an outstanding warrant, Armstrong asked appellant if he had any narcotics. Appellant replied he had crystal, which was street vernacular for methamphetamine, in his shoe. Armstrong asked appellant to remove his shoe, appellant complied, and Armstrong found a baggy containing .05 grams net weight of a substance containing methamphetamine in the shoe. Appellant said he was only a smoker.

---

1 Jones is not a party to this appeal.

Armstrong conducted a thorough patdown search of appellant and Jones. Appellant, Jones, and a second woman were each handcuffed and transported in the back seat of a police car to the police station. The reason the second woman was transported had nothing to do with the present case; she was taken to verify her identity. Razo conducted a brief patdown on the second woman. The prosecutor asked whether Razo did a thorough patdown search of the second woman or a cursory waistband search, and Razo indicated he did the latter. He did not search the second woman for narcotics. Although appellant, Jones, and the second woman were handcuffed, they could move their hands and arms.

Upon arrival at the police station, Armstrong opened the police car door and saw Jones putting a small plastic baggy into the back seat cushion of the car. The baggy contained 2.51 grams net weight of a substance containing cocaine base.

After appellant and Jones were inside the police station, Los Angeles Police Officer Michael Mitchell prepared to search Jones. Jones removed a plastic baggy from the crotch of his pants and gave the baggy to Mitchell. The baggy contained 2.78 grams net weight of a substance containing cocaine base. No money or drug paraphernalia was found on Jones.

Mitchell searched appellant and found in his right pants pocket $32, consisting of one $10 bill, 17 $1 bills, and one $5 bill. Mitchell did not find drug paraphernalia on appellant.

Armstrong, a narcotics expert, testified that a common method of selling drugs was for two or more persons to work in concert. One person would handle the money and the other would distribute the narcotics. This way each person could claim he was not selling narcotics. Drug dealers commonly hid and stored drugs in the crotches of their pants. Armstrong opined at trial that the narcotics recovered from Jones were possessed for sale.

Razo testified at trial also, and his testimony concerning what he saw appellant and Jones do, and concerning what he later saw appellant, Jones, and the female do, was substantially the same as the testimony of Armstrong on these issues. Razo also testified

that when the officers were talking to appellant and Jones at the scene, the second woman spoke to Razo. The second woman appeared to be trying to defend appellant. Appellant presented no defense evidence.

CONTENTIONS

Appellant presents related claims that the trial court (1) erroneously excluded testimony from Derrick Ferguson that, during an unrelated investigation, Armstrong had threatened to fabricate evidence against Ferguson unless he cooperated with Armstrong, and (2) erroneously precluded appellant from cross-examining Armstrong on the issue. Appellant also claims his conviction on count 1 must be reversed because the jury relied upon an erroneous theory to convict him on that count.

DISCUSSION

1. *The Court Did Not Reversibly Err by Excluding Testimony from Ferguson, or by Precluding Appellant from Cross-Examining Armstrong, Concerning Whether Armstrong Had Threatened to Fabricate Evidence Against Ferguson.*

a. *Pertinent Facts.*

Appellant was represented at trial by Attorney James Tobin, and Jones was represented by Attorney Anthony Tahan. On June 20, 2007, outside the presence of the jury and prior to the People's direct examination of Armstrong (the People's first witness), the prosecutor represented it was her understanding from Tahan that "his *Pitchess* witness" intended to invoke the Fifth Amendment in the present case. The witness was later identified as Derrick Ferguson.

The prosecutor indicated that, since Ferguson would invoke the Fifth Amendment, Tahan should be precluded from cross-examining Armstrong about Ferguson since Tahan would lack a basis for his questions and the jury would be confused. The court and prosecutor acknowledged that Ferguson's identity was disclosed pursuant to a *Pitchess* motion which revealed his involvement in a case unrelated to the present one. The court tentatively agreed that if Ferguson could not testify because he invoked the Fifth Amendment, there was no testimonial basis permitting cross-examination of Armstrong; therefore, Armstrong could not testify concerning Ferguson.

The court inquired as to relevance and asked what testimony Tahan would present. Tahan later indicated that Ferguson (absent invocation of the Fifth Amendment) would testify that Armstrong, investigating a liquor store robbery and attempted murder, contacted Ferguson and asked him who committed the crimes and who was there. Ferguson replied he did not know anything, and Armstrong said that if Ferguson would not cooperate with Armstrong, Armstrong would "put a case" on Ferguson. Tahan said Ferguson would also testify that, shortly after Armstrong made that statement, Ferguson was arrested for the crimes and Armstrong "fabricated an identification." According to Ferguson, he was later exonerated when a video of the robbery showed he had nothing to do with it and had not been present.

Tahan indicated he had not yet decided whether to do so, but he was thinking about asking Armstrong if he knew Ferguson. If Armstrong acknowledged that he knew Ferguson, Tahan was going to ask Armstrong whether, in a prior unrelated case, he made the statement about "put[ting] a case" on Ferguson. Tahan commented that Armstrong might answer yes, Tahan was entitled to ask the question because he had a good faith basis for his question, and the testimony would be relevant to Armstrong's credibility. The court indicated Tahan could impeach Armstrong only by testimony from another witness who was subject to cross-examination.

Tobin, appellant's counsel, later asked whether it was permissible to ask Armstrong whether Ferguson made a complaint against Armstrong regarding Armstrong's treatment of Ferguson in a previous case. The court indicated the question called for irrelevant hearsay and an impermissible form of character evidence which was excludable under Evidence Code section 352.

During discussions concerning Ferguson's testimony, Tahan proffered Ferguson's testimony and said it was relevant to show Armstrong was fabricating. Tahan suggested that if Ferguson's right against self-incrimination was balanced against Jones's rights to a fair trial and due process, the impeachment could be tailored by the parties stipulating that Ferguson had suffered prior convictions, with the result that Ferguson would be able to testify. The court at one point asked what happened to Ferguson as a result of

Armstrong's statement, and Tahan said Ferguson was incarcerated for a period "and then the charges that were supposedly . . . fabricated went away."

Tahan denied he had any other evidence of Armstrong's alleged threat. Tahan also said, "So if I can't do it, I can't do it, . . . I'd like to be able to confuse the jury and make them think there's worse things about, . . . detective Armstrong than they may already have heard."

Ferguson later appeared with counsel. Although the record is not a model of clarity, the record, fairly read, reflects as follows. The essence of Ferguson's proffered testimony was, as mentioned, that Armstrong, in an unrelated matter, once threatened to fabricate evidence of Ferguson's involvement in crimes if he did not cooperate with Armstrong. Ferguson, in still another matter, had suffered a weapons conviction (apparently for a violation of Penal Code section 12021, subdivision (a)(1)). In that weapons case, a motion for a new trial was pending and, because sentencing had not yet occurred in that case, the trial court in that case had yet to determine to truth of a strike allegation against Ferguson (which included determinations of whether Ferguson suffered a prior felony conviction, whether it was for robbery, and whether robbery is a prior serious or violent felony, that is, a strike).

Ferguson indicated that if he testified in the present case about Armstrong's threat, Ferguson did not want to be cross-examined "*about* that [weapons] case." (Italics added.) Ferguson also indicated he probably did not want to be cross-examined "about his record," meaning, according to Ferguson, that he did not want to be impeached with the prior strike.

Ferguson argued that if, in the present case, he was cross-examined about the weapons case or impeached with the prior strike, his resulting testimony about those matters might incriminate him if his motion for a new trial in the weapons case was granted and he testified in the weapons case, since his testimony in the weapons case could then be impeached by his testimony from the present case about the weapons case or the strike. He did not expressly claim that cross-examination in the present case about the *fact* of the three prior convictions (including the weapons conviction) would lead to

testimony which might incriminate him at such a retrial, or that he was invoking his right against self-incrimination for that reason.

Ferguson had suffered two weapons convictions, a theft conviction, and a robbery conviction. Each of the weapons convictions was based on a violation of Penal Code section 12021, subdivision (a), and one of the weapons convictions was recent. The recent weapons conviction was the weapons case about which Ferguson did not want to be cross-examined in the present case, and the robbery conviction was the basis for the previously mentioned strike allegation.

The court later said, "I would say that he would take the Fifth, just plain and simple, if you ask him his name." The parties then effectively stipulated that Ferguson invoked his right against self-incrimination to prevent him from being impeached by any of his four prior convictions (one being the pending weapons conviction, another being the strike), that is, to prevent him from being cross-examined in the present case about any of his four prior convictions since the resulting testimony might incriminate him in any retrial in the weapons case. The court accepted the stipulation.

During jury argument, appellant argued he did not possess the subject cocaine base and the jury should consider the second woman's comments to Razo in defense of appellant. Appellant conceded to the jury that he possessed the subject methamphetamine.

b. *Analysis.*

Appellant claims the trial court erroneously excluded testimony from Ferguson that Armstrong had threatened to fabricate evidence against Ferguson. Appellant argues the court erred by failing (1) to ask the prosecutor to grant Ferguson immunity, (2) to grant Ferguson judicial immunity, and (3) to preclude the People from impeaching Ferguson with the robbery strike. Appellant argues the exclusion of Ferguson's testimony violated appellant's rights to present a defense and to due process. Appellant presents the related claim that the trial court erred, in violation of appellant's right to due process, by precluding appellant from cross-examining Armstrong about his alleged threat.

(1) *The Exclusion of Ferguson's Proffered Testimony.*

(a) *Appellant Waived the Issues.*

As to appellant's first claim, that the court erroneously excluded Ferguson's proffered testimony, appellant waived the issues on appeal since his attorney failed to raise them below. (Cf. *People v. Lucas* (1995) 12 Cal.4th 415, 459-460; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126, fn. 30; *People v. Cudjo* (1993) 6 Cal.4th 585, 619; *People v. Saunders* (1993) 5 Cal.4th 580, 589-590; *People v. Benson* (1990) 52 Cal.3d 754, 786-787, fn. 7.) Tahan, codefendant Jones's counsel, proffered testimony from Ferguson, but appellant, through his attorney, did not. Appellant only raised a question about whether he could impeach Armstrong by way of cross-examination. Indeed, appellant ultimately stipulated that Ferguson invoked his right against self-incrimination in part because he otherwise would have been subject to impeachment with the strike.[2]

(b) *No Error Occurred.*

As to the merits of appellant's immunity arguments, the decision as to whether the People will grant immunity lies wholly with the People, not the courts (see *People v. Samuels* (2005) 36 Cal.4th 96, 127; *People v. DeFreitas* (1983) 140 Cal.App.3d 835, 838-841), and appellant cites no case holding a trial court errs by failing to ask the prosecution to grant immunity. It is dubious the trial court itself could have granted judicial immunity. (*People v. Samuels, supra,* 36 Cal.4th at p. 127.) Even if the trial

---

[2] Because Ferguson did not testify, we cannot know whether the prosecutor would have impeached him with the strike, and cannot evaluate the impact of any impeachment with the strike upon actual testimony by Ferguson. We need not decide whether, for this additional reason, appellant has waived the issue of whether Ferguson's testimony was erroneously excluded insofar as appellant's argument is based on the trial court's failure to preclude the prosecutor from impeaching Ferguson with the strike. (See *People v. Ayala* (2000) 23 Cal.4th 225, 272-273 (*Ayala*).) We note *Ayala* discussed *People v. Collins* (1986) 42 Cal.3d 378, which indicated that actual testimony, and not merely a proffer, is required to preserve the issue of whether a trial court erroneously permitted the People to use a prior conviction to impeach a witness. (*Id.* at p. 384.)

court could have done so, we conclude, based on the reasons set forth in our harmless error analysis below, that Ferguson's proffered testimony was neither clearly exculpatory nor essential, and a denial of immunity would not have distorted the judicial fact-finding process; therefore, the court did not err by failing to grant judicial immunity. (Cf. *People v. Hunter* (1989) 49 Cal.3d 957, 974.)

As to the merits of appellant's arguments concerning impeachment with the strike, " 'trial courts have broad discretion to admit or exclude prior convictions for impeachment purposes . . . . The discretion is as broad as necessary to deal with the great variety of factual situations in which the issue arises, and in most instances the appellate courts will uphold its exercise whether the conviction is admitted or excluded.' " (Citation.) (*People v. Hinton* (2006) 37 Cal.4th 839, 887.) Moreover, we apply a de novo standard to review a trial court's ruling that a witness may assert the right against self-incrimination. (*People v. Seijas* (2005) 36 Cal.4th 291, 304.) There is no dispute that if Ferguson was impeached in the present case with the facts underlying the pending weapons conviction or with the strike, his resulting testimony on these matters might have incriminated him if (1) a retrial was granted in the weapons case, (2) he testified in that matter, and (3) the People sought to impeach him there with the impeaching testimony he gave in the present case.

The decision regarding whether to let the People impeach Ferguson in the present case with a sanitized prior conviction (making the People refer to it only as a prior felony conviction instead of a robbery conviction) was within the sound discretion of the trial court (*People v. Johnson* (1991) 233 Cal.App.3d 425, 459). Even if the prior robbery conviction was sanitized, and Ferguson merely admitted in the present case that he suffered a prior felony conviction, that admission too might have incriminated him in the weapons case.

The trial court did not err by failing to preclude the People from impeaching Ferguson with the strike, or by accepting the parties' stipulation that Ferguson would invoke his right against self-incrimination.

Further, as to the trial court's failures (1) to ask the prosecutor to grant Ferguson immunity, (2) to grant Ferguson judicial immunity, and (3) to preclude the People from impeaching Ferguson with the robbery strike, the application of ordinary rules of evidence, as here, did not violate appellant's right to due process or other constitutional rights. (Cf. *People v. Boyette* (2002) 29 Cal.4th 381, 427-428.)

(c) *Any Error Was Not Prejudicial.*

Finally, the proffered testimony from Ferguson was that, at an unspecified time in an unrelated case, Armstrong threatened to fabricate evidence against him. The proffered testimony did not clearly exculpate appellant by negating an element(s) of the present offenses or by presenting an affirmative defense. At best, the proffered testimony merely would have impeached Armstrong's credibility. At one point, Tahan (codefendant Jones's counsel), who took the lead during argument on the admissibility issues, suggested the charges against Ferguson were only "supposedly" fabricated. We also note the reporter's transcript reflects Tahan's comments that he proffered Ferguson's testimony to confuse the jury.

There was no dispute below, nor is there any dispute here, that Ferguson could have been impeached in the present case with his prior convictions other than the strike; appellant ultimately stipulated Ferguson invoked his right against self-incrimination based on the risk of his impeachment with all of his prior convictions. Testimony by Ferguson as to the prior convictions other than the strike (as well as any testimony about the weapons case) could have incriminated him at any retrial in the weapons case if he had not invoked his right against self-incrimination in the present case.

There is no dispute appellant was present at the scene of the offenses. The real issue at trial was whether he possessed the subject cocaine base. The jury reasonably could have concluded Armstrong's testimony was not inherently implausible. Moreover, appellant conceded during jury argument that he possessed the subject methamphetamine for which he was convicted on count 2. Armstrong was the only person who testified that appellant had that methamphetamine in his shoe. Armstrong's testimony on this issue and appellant's concession to the jury that he possessed the methamphetamine bolstered

the credibility of Armstrong's testimony that appellant possessed the cocaine base. Appellant's concession also militates against the conclusion that the exclusion of Ferguson's proffered testimony was prejudicial error as to count 2.

Further, whether or not Armstrong was credible, the testimony of Razo concerning what occurred was substantially similar to that of Armstrong, and the jury reasonably could have believed Razo's testimony to conclude appellant possessed the cocaine base. In sum, even if the trial court erred, the error was harmless under any conceivable standard. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].)

(2) *The Court's Preclusion of Appellant's Cross-Examination of Armstrong.*

As to appellant's claim that the trial court erred by precluding appellant from cross-examining Armstrong on whether he made the alleged threat to Ferguson, we assume without deciding that appellant was entitled to cross-examine Armstrong on the issue. (Cf. *People v. Wheeler* (1992) 4 Cal.4th 284, 288, 291-292; *People v. Steele* (2000) 83 Cal.App.4th 212, 222-223.)

Nonetheless, reasoning similar to that which we employed to conclude the trial court's exclusion of Ferguson's testimony was harmless error applies here. Moreover, the record does not demonstrate the likelihood that Armstrong fabricated evidence as alleged by Ferguson or that Armstrong would have admitted such an allegation during cross-examination. Tahan (codefendant Jones's counsel) who took the lead on the admissibility issues, indicated at one point that he had not even decided whether to cross-examine Armstrong concerning the alleged threat. We conclude any trial court error in precluding appellant from cross-examining Armstrong about the alleged threat was harmless under any conceivable standard. (Cf. *People v. Watson, supra*, 46 Cal.2d at p. 836; *Chapman v. California, supra*, 386 U.S. at p. 24.)

2. *The Jury Did Not Rely Upon a Legally Inadequate Theory to Convict Appellant on Count 1.*

Appellant claims the jury relied upon a legally incorrect theory to convict appellant on count 1 because, according to appellant, the prosecutor argued to the jury that appellant could be "in constructive possession of the cocaine merely by helping to sell it without himself having access to or dominion and control over it." We conclude otherwise.

a. *Pertinent Facts.*

During opening argument as to count 1, the prosecutor argued as to the element of possession, "How do we know that Mr. Camacho possessed a controlled substance? Well, you all are probably wondering, he didn't have it on his person. How could he be in control of something when somebody else has it? Well, the judge is going to give you some definitions. And I want to go briefly over with you that point, that there's going to be an instruction that tells you that two or more people may possess something at the same time, and that a person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it either personally or through another person. So the key in this is, the right to control it."

The prosecutor continued, "And *how do we know that Mr. Camacho had the right to control it? Well, if you look back and think back to the testimony of the officers, . . . Mr. Camacho accepted the money, and it was only after Mr. Camacho accepted the money did Mr. Jones turn over the cocaine. That's how we know that Mr. Camacho had control over it. Because cocaine is not free, it's not given. So it's - - the fact that . . . Mr. Camacho accepted the money is what caused Mr. Jones to give over the cocaine. That's the right to control it."* (Italics added.)[3] Appellant did not object to the prosecutor's opening argument.

---

[3] Appellant relies on the above italicized comments of the prosecutor to support appellant's claim.

During jury argument, appellant disputed (1) that he possessed the subject cocaine base, (2) that he and Jones were working together to sell the cocaine base, and (3) that appellant aided and abetted such a sale, but appellant conceded he possessed the subject methamphetamine.

The court later instructed the jury on the general principles of aiding and abetting (Judicial Council of Cal. Crim. Jury Instns. (2008) CALCRIM No. 400),[4] aiding and abetting intended crimes (CALCRIM No. 401),[5] and possessing for sale a controlled substance (CALCRIM No. 2302).[6]

---

[4] That instruction stated, "A person may be guilty of a crime in two ways: one, he may have directly committed the crime; two, he may have aided and abetted someone else who committed the crime. [¶] In these instructions, I will call the other person the perpetrator. A person is equally guilty of the crime whether he committed it personally or aided and abetted the perpetrator who committed it. In some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime."

[5] That instruction stated, "To prove the defendant or defendants . . . are guilty of a crime based on aiding and abetting that crime, the People must prove that: one, the perpetrator committed the crime; two, the defendant knew that the perpetrator intended to commit the crime; three, before or during the commission of the crime the defendant intended to aid and abet the perpetrator in committing the crime; and four, the defendant's words or conduct did, in fact, aid and abet the perpetrator's commission of the crime. Someone aids and abets a crime if he knows of the perpetrator's unlawful purpose, and he specifically intends to and does in fact aid, facilitate, promote, encourage or instigate the perpetrator's commission of that crime. If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor. If you conclude that the defendants were present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not by itself make him an aider and abettor."

[6] That instruction stated, in relevant part, "The defendants are charged in count 1 with the possession for sale of cocaine base, a controlled substance. To prove that the defendants are guilty of this crime, the People must prove that: one, the defendants . . . possessed a controlled substance; . . . [¶] . . . [¶] Two or more people may possess something at the same time. A person does not have to actually hold or touch something

b. *Analysis.*

In *People v. Ruiz* (1961) 196 Cal.App.2d 695, we observed, " 'The possession [of narcotics] may be individual, through an agent, or joint with another. [Citation.] All persons concerned in the commission of the crime, whether they commit the act constituting the offense or aid and abet in its commission, are principals. (Pen. Code, § 31.) We think it clear that one may aid and abet another in the possession of a narcotic. . . .' [Citation.]" (*People v. Ruiz*, at pp. 700-701, fn. 2.)[7]

We have set forth the pertinent facts in the Factual Summary. The female conversed with appellant and Jones and gave appellant money. Jones then gave her narcotics which he had secreted in his pants. Apart from whether appellant could have accessed the secreted narcotics himself, the jury reasonably could have concluded appellant and Jones were working together as a team to sell narcotics by appellant physically taking the would-be buy money and Jones physically distributing the narcotics to the would-be purchaser, and that appellant and Jones understood that Jones would not distribute narcotics for free but would relinquish his actual possession of the narcotics only after appellant received the money.

---

to possess it. It is enough if the person has control over it or the right to control it either personally or through another person."

[7] Appellant asserts aiding and abetting liability for possessory crimes without proof of constructive possession leads to absurd consequences because, e.g., a defendant whose roommate possessed and smoked marijuana in their shared residence could be liable for the possession as an aider and abettor if the defendant *knew* of the roommate's possession and smoking, even if the defendant did not constructively possess the marijuana. We note aiding and abetting liability requires not only that the defendant know of the perpetrator's unlawful purpose, but that the defendant specifically *intend* to facilitate, promote, encourage or instigate the perpetrator's commission of the crime (see fn. 5). If, for example, (1) the defendant gave money to the roommate so the latter could buy the marijuana, knowing the latter would do so and intending to facilitate, promote, etc., the purchase and possession, (2) the roommate went by himself and purchased and possessed the marijuana, and (3) the roommate later possessed and smoked the marijuana in the shared residence, the defendant would be liable for the possession as an aider and abettor.

In sum, there was sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, that (1) appellant constructively possessed the narcotics which Jones actually possessed, that is, that appellant had a right to control, through Jones, those narcotics, *and* (2) appellant aided and abetted Jones's narcotics possession. Whether appellant could physically access the crotch of Jones's pants where he actually possessed the narcotics is not controlling. Moreover, appellant poses no challenge to the jury instructions on accomplice liability and narcotics possession except perhaps to the extent he argues one cannot aid and abet narcotics possession, an argument we have rejected.

Appellant waived the issue of whether the prosecutor committed misconduct during jury argument on these possession issues by failing to object to the argument and failing to request a jury admonition. (Cf. *People v. Mincey* (1992) 2 Cal.4th 408, 471.) Even if the prosecutorial misconduct issue was not waived, the prosecutor did not, as urged by appellant, argue to the jury that appellant could be "in constructive possession of the cocaine *merely* by helping to *sell* it without himself having access to or dominion and control over it." (Italics added.)

In *People v. Guiton* (1993) 4 Cal.4th 1116 (*Guiton*), cited by appellant, our Supreme Court concluded that when a jury is merely presented with alternative theories of conviction, one of which is factually sufficient and the other of which is not, the judgment must be affirmed unless the record demonstrates the jury in fact relied on the factually insufficient theory. However, if, a jury is presented with alternative theories of conviction, one of which is legally inadequate, reversal is required absent a basis in the record to find that the verdict was actually based on a valid ground. (*Id.* at p. 1129.)

The present case was not submitted to the jury on two factual theories, one of which was, and one of which was not, factually sufficient. Nor was this case submitted on two legal theories, one of which was, and one of which was not, legally adequate. This case was presented to the jury on the factually sufficient legal theories that appellant constructively possessed the cocaine base, and that appellant aided and abetted Jones's possession thereof. *Guiton* is therefore inapplicable. Moreover, even if the prosecutor

had made the argument appellant ascribes to him, *Guiton* error cannot be based on prosecutorial jury argument alone. (*People v. Morales* (2001) 25 Cal.4th 34, 43.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.